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INTEREST OF *AMICI*

The American Civil Liberties Union (ACLU) is a non-partisan organization of almost 300,000 members dedicated to protecting civil liberties and civil rights. The ACLU has a long history of promoting full government disclosure of information through litigation and legislation. The ACLU also has a strong interest in protecting privacy rights and has supported legislation guarding private information from unwarranted disclosure.

The Computer Professionals for Social Responsibility (CPSR) is a non-partisan organization whose members include a Nobel Laureate and four winners of the Turing Prize, the highest honor in computer science. The CPSR supports both open access to government information and privacy protection for personal information.

When these two interests -- open government and individual privacy -- conflict in Freedom of Information Act (FOIA) cases under Exemption 6 or 7(C), the ACLU and the CPSR believe that FOIA requires courts to evaluate the strength of these competing interests to decide whether FOIA requires disclosure of the requested information. As an *amicus curiae* in *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), the ACLU argued that the lower court had incorrectly analyzed the competing interests. The lower court had taken a too narrow view of both the privacy interest and the public interest at stake with respect to disclosure of computerized criminal history records.

In this case, the ACLU and the CPSR urge the Court to recognize the substantial public interest that must be balanced against the privacy interest implicated by disclosure of the requested names and addresses. The

Government's assertions -- that there is no public interest in information that does not shed light "directly" on what the government is up to and that names and addresses of individuals virtually never shed light directly on governmental activities -- are directly at odds with this Court's holding in *Reporters Committee*. For these reasons, the ACLU and the CPSR urge the Court to reject the Government's analysis and to affirm the lower court's decision requiring disclosure.[1]

STATEMENT OF THE CASE

On September 23, 1981, the United States entered into an agreement with the government of Haiti for the purpose of preventing "illegal immigration" of Haitians into the United States. Agreement on Migrants--Interdiction, Sept. 23, 1981, United States-Haiti, 33 U.S.T. 3559, T.I.A.S. No. 10241. The agreement provided that the United States would interdict Haitians attempting to enter the United States illegally. *Ibid*. The United States also would repatriate all interdicted Haitians except those who "qualify for refugee status." *Ibid*. In return, Haiti agreed not to persecute the returnees for their departures. *Ibid*.

To evaluate the Government's policy of repatriating interdicted Haitians and to determine whether to continue that policy, the State Department began in late 1981 to monitor Haiti's compliance with its agreement not to persecute returnees. J.A. 42, 55, 56. First, officials assigned to the United States Embassy in Haiti obtained the interdictees' names and addresses as they were returned to Haiti by the U.S. Coast Guard. J.A. 56. Then, after passage of a few months, State Department personnel interviewed a sample of the returnees to determine whether they had been harassed or mistreated. J.A. 56.

From the interviews it conducted, the State Department concluded that Haiti was abiding by its agreement not to persecute returnees. J.A. 67-73. The Government accordingly continued to repatriate interdicted Haitians. J.A. 67-73. It also represented to the public and to the Immigration and Naturalization Service (INS) that undocumented Haitians living in the United States need not fear persecution upon return to Haiti. J.A. 67-73. In turn, an INS official granted a newspaper interview in which he was quoted as saying that the INS would release upon request the names of approximately six hundred Haitians who had been involuntarily returned to Haiti and who would confirm, if contacted, that they had not been mistreated. J.A. 28.

That newspaper story caused Respondent Michael D. Ray, a Miami attorney who represents Haitians in asylum cases, to request the INS to release the six hundred names pursuant to FOIA. J.A. 15, 19. The INS answered Mr. Ray's FOIA request by stating that the newspaper had misquoted the INS official and that the INS had no such list of six hundred names. J.A. 38-39.

Mr. Ray subsequently filed a FOIA request with the State Department, seeking reports of interviews conducted to monitor Haiti's treatment of returnees. J.A. 22, 41. Some two years later, the Department finally responded by releasing to Mr. Ray twenty-five documents relating to the Department's monitoring efforts. J.A. 41. Seventeen of those documents summarize interviews with individually identified returnees. But, invoking FOIA's Exemption 6, the Department redacted from those summaries

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[1]Counsel for the Petitioner and for the Respondents have consented to the submission of this brief *amicus curiae*. Their letters of consent are on file with the Clerk.

the names and addresses of the interviewees. J.A. 42. This lawsuit challenges the propriety of withholding those names and addresses.

SUMMARY OF ARGUMENT

This case is about how to evaluate competing interests in privacy and open government under Exemption 6. That exemption provides that agencies may withhold only personal information "the disclosure of which *would* constitute a *clearly unwarranted* invasion of personal privacy." 5 U.S.C. § 552(b)(6) (1986) (emphasis added). Although the names and addresses at issue here are personal information that implicates an Exemption 6 privacy interest, that interest does not outweigh the strong public interest in the light that their release would shed on implementation of the Government's immigration policy. Thus, their disclosure would not "constitute a *clearly unwarranted* invasion of personal privacy," and FOIA compels their release.

The court below properly balanced the public and privacy interests at stake in this case. Pet. App. 13a. The Government's challenge, in contrast, badly distorts the Exemption 6 analysis. First, rather than submitting explicit evidence that disclosure would cause an invasion of privacy, the Government merely asserts that disclosure of the interviewees' names and addresses would subject them to *"possible* embarrassment" and subvert the *"understanding"* of confidentiality surrounding the interviews. As the courts below found, the interviewees have *some* interest in maintaining the privacy of their names and addresses. Pet. App. 7a-8a, 29a. But to demonstrate that the privacy interest at stake in this (or any other) Exemption 6 case is strong enough to justify nondisclosure, the Government must produce more than mere undocumented assertions.

The Government also ignores the full range of public interests to be considered in Exemption 6 and 7(C) cases. Consistent with FOIA's general philosophy of full disclosure, this Court has long held that FOIA's disclosure requirements are to be read broadly and its exemptions construed narrowly. *United States Department of Justice v. Julian*, 486 U.S. 1, 8 (1988) (citing *FBI v. Abramson*, 456 U.S. 615, 630 (1982); *Department of the Air Force v. Rose*, 425 U.S. 352, 361 (1976)). This interpretive maxim requires a broad definition of the public interests to be considered in Exemption 6 and 7(C) cases. Thus, *Reporters Committee* held that courts considering the public-interest side of the balance in such cases must determine whether release of the requested information would "shed *any* light on the conduct of *any* Government agency or official." 489 U.S. at 773 (emphasis added).

The information Respondents seek in this case undeniably would shed light on the State Department's conduct concerning its Haitian repatriation policy. Release of the interviewees' names and addresses would reveal the source of the facts underlying an aspect of the nation's immigration policy. It would further FOIA's "basic purpose . . . 'to open agency action to the light of public scrutiny,'" *Rose*, 425 U.S. at 372, by telling the public against whom the Government enforced its policy of repatriation and upon whom the State Department relied in evaluating that policy and in deciding to continue it.

Contrary to the Government's assertion, Pet. Br. 20-27, the public's interest in the names and addresses is quite strong. FOIA compels the release of that information unless the Government demonstrates that the interviewees' interests in maintaining the privacy of their names and addresses is so great that disclosure would be "clearly unwarranted." Speculation about *"possible* embar-

rassment" and suggestions of *"understandings"* of confidentiality do not outweigh the significant public interest in the information requested here. Accordingly, this Court should affirm the judgment of the court of appeals.

ARGUMENT

I. Application Of Exemption 6 Requires A Careful Weighing Of Individuals' Interests In Privacy And The Public Interest in Open Government.

Applying Exemption 6 requires a careful "balancing of the individual's right of privacy against the preservation of the basic purpose of [FOIA] 'to open agency action to the light of public scrutiny.'" *Department of the Air Force v. Rose,* 425 U.S. 352, 372 (1976) (quoting *Department of the Air Force v. Rose,* 495 F.2d 261, 263 (2d Cir. 1974)). The "preliminary question" in that balancing is whether the Government has demonstrated that release of the requested information would implicate "the sort of 'personal privacy' interest that Congress intended [Exemption 6] to protect." *United States Department of Justice v. Reporters Committee for Freedom of the Press,* 489 U.S. 749, 762 (1989). If not, the information must be disclosed. *Ibid.*

If the Government demonstrates that a personal privacy interest is implicated, the Court must consider a second question: whether there is a public interest in disclosure of the requested information. For purposes of Exemption 6, such a public interest exists if release of the information would "shed any light on the conduct of any Government agency or official." *Id.* at 773. If release would shed no such light, the agency may withhold the information. *Id.* at 780.

If disclosure would shed light on governmental conduct, FOIA requires a court to balance the public interest in its release against the implicated privacy interest. That balancing is significantly different under Exemption 6 than under 7(C). As this Court noted in *Reporters Committee*, "Exemption 7(C)'s privacy language is broader than the comparable language in Exemption 6 in two respects." 489 U.S. at 756. First, whereas 7(C) protects against an "unwarranted invasion" of privacy, Exemption 6 requires the invasion of privacy to be *"clearly* unwarranted." *Ibid.* Second, while Exemption 7(C) encompasses any disclosure that *"could reasonably* be expected to constitute" an unwarranted invasion, Exemption 6 is limited only to disclosures that *"would* constitute" a clearly unwarranted invasion. *Ibid.* Quite simply, the Government bears a heavier burden to justify nondisclosure under Exemption 6 than under Exemption 7. In Exemption 6 cases, FOIA compels disclosure unless the Government demonstrates that the individual's interest in maintaining the privacy of the information is so great that disclosure would be *"clearly* unwarranted." *Ibid.*; *United States Department of State v. Washington Post Co.,* 456 U.S. 595, 602 (1982).

In this case, the court of appeals properly conducted the Exemption 6 balancing process step by step. It first determined that there are Exemption 6 privacy interests at stake. Pet. App. 8a. It then weighed the public interest in knowing about the State Department's conduct concerning interdicted Haitians against the interviewees' interests in maintaining the privacy of their names and addresses. Pet. App. 8a-13a. The court concluded that the Government had failed to establish that disclosure would be "clearly unwarranted" in this case. Pet. App. 13a. Rather, any invasion of privacy resulting from disclosure would be outweighed by the strong public interest in release of the information. *Ibid.* That conclusion should be upheld.

II. The Government Bears A Preliminary Burden To Show That Disclosure Would Implicate A Significant Exemption 6 Privacy Interest.

An Exemption 6 privacy interest undeniably is at stake in this case. The name and address of each interviewee clearly constitute information about that person. Both "the common law and the literal understandings of privacy" traditionally encompass such personal information. *Reporters Committee*, 489 U.S. at 763. But that does not end the inquiry. The real question on the privacy side of the scale is whether the Government has carried its burden to show that the interviewees' have a strong privacy interest -- one strong enough to justify nondisclosure.

Several factors affect the significance of a personal privacy interest implicated by disclosure of governmental information. One such factor is whether disclosure would be reasonably likely to cause serious harm to the subject of the requested information. *See, e.g., Reporters Committee,* 489 U.S. at 780 (private citizen had strong privacy interest in preventing release of rap sheet containing information likely to injure his reputation); *Washington Post*, 456 U.S. at 597 & n.2 (members of Iran's revolutionary government had strong privacy interest in preventing disclosure of their American citizenship, as it would likely result in their physical abuse); *Rose*, 425 U.S. at 381 (disciplined service academy cadets had strong privacy interest in preventing their identification as honor code violators, because it would likely damage their professional military standing); *see also, e.g., Ditlow v. Shultz,* 517 F.2d 166, 170 (D.C. Cir. 1975) (air passengers who traveled a particular route during a specific period had "less than a substantial" privacy interest in release of their names and addresses where only likely result would be receipt of class-action notice).

Another factor affecting the significance of the privacy interest is whether the requested information describes the subject's interaction with an agency of the Government or with private parties. *See, e.g., Hopkins v. HUD*, 929 F.2d 81, 87 (2d Cir. 1991) (finding "significant" privacy interest in payroll information revealing how much private parties were paid by their private employers). Others include whether the requested information is "freely available" in substantially the same form, *Reporters Committee,* 489 U.S. at 763-64, whether federal, state, or local legislation recognizes the private nature of the information, *id.* at 765, whether a governmental promise of confidentiality was necessary to obtain the information, *Washington Post Co. v. HHS,* 690 F.2d 252, 263 (D.C. Cir. 1982), and whether the requested information concerns one person or many. *Reporters Committee,* 489 U.S. at 775, 780 (noting strong privacy interest implicated by "FOIA request for information about a particular private citizen").

In order to demonstrate a *significant* privacy interest, the Government must produce specific evidence concerning the foregoing (or similar) factors. Here, the Government's declarations are simply insufficient to establish that a significant privacy interest would be clearly threatened by disclosure of the interviewees' names and addresses. The Declaration of John Eaves states merely that release of the interviewees' names and addresses "would . . . subject them or their families to *possible* embarrassment in their social and community relationships." J.A. 43 (emphasis added). But "Exemption 6 was directed at threats to privacy interests more palpable than mere possibilities." *Rose,* 425 U.S. at 380 n.19. The Government must affirmatively show that release would cause an invasion of privacy. The Eaves declaration does not carry that burden, especially given the fact that the interview summaries themselves reveal that State Depart-

ment personnel told many interviewees' neighbors about the interviews. *See, e.g.,* Pet. Lodging 4 (stating that the returnee officer "asked some women sitting outside [deletion] if they were acquainted with [deletion] and explained that [the officer] wanted to interview him to learn how he had been since his return after the 7/12/83 interdiction of the 'C'est la Vie'").[2]

Neither does the Government provide sufficient evidence that the Department's interviewers promised confidentiality. In his declaration, Mr. Eaves suggests that "those who were interviewed consented to the procedures *with the understanding* that their conversations with Embassy officers would be conducted under conditions of privacy and confidentiality." J.A. 42-43 (emphasis added). But Mr. Eaves did not participate in the interviews; he did not hear what was said and could not know what the interviewees "understood." His declaration does not recount what the interviewers told the interviewees or in any other way establish that the Government promised to keep confidential the fact that certain persons consented to be interviewed. Even less does it show that any promises or understandings were necessary to secure the interviews. *Cf. Critical Mass Energy Project v. NRC,* No. 90-5120, slip op. at 14-15 (D.C Cir. Apr. 30, 1991) (to justify nondisclosure under Exemption 4, Government must produce specific evidence that confidentiality was necessary to obtain requested information). Indeed, such a showing would be difficult in light of the State Department's admissions that many of the interviewees traveled to the U.S. Embassy of their own

[2]There is no contention here that disclosure of the interviewees' identities would reveal whether they had applied for political asylum. That information is both presumptively confidential, *see* 8 C.F.R. § 208.6 (1991), and reasonably likely, if disclosed, to subject such an applicant to substantial risk of retaliation.

accord and volunteered to talk to American officials about their experiences. *See, e.g.,* Pet. Lodging 10, 12.

Moreover, even assuming that the Government made such promises, confidentiality and personal privacy are not synonymous. Governmental promises of confidentiality do not, by magic, convert disclosures of information into invasions of personal privacy. If they did, State Department promises, rather than the will of Congress, would determine the scope of Exemption 6. *Washington Post Co. v. HHS,* 690 F.2d at 263. Instead, a promise of confidentiality is one factor to be considered in determining whether disclosure would cause an invasion of personal privacy. *See supra* at 9. Standing alone, however, such a promise cannot justify nondisclosure. *Washington Post Co. v. HHS,* 690 F.2d at 264. If the Government is to demonstrate that a privacy interest is so significant that its invasion would be clearly unwarranted, it must offer more than "understandings," "possibilities," and rhetoric.

III. Disclosure Of The Interviewees' Names And Addresses Would Serve The Public Interest By Shedding Light On State Department Conduct.

The Government's assertions concerning the public-interest side of the scale are similarly inadequate to justify nondisclosure. In *Reporters Committee,* this Court made clear that for the purposes of Exemption 6 and 7(C) the public has an interest in the disclosure of any information that would "shed any light on the conduct of any Government agency or official." 489 U.S. at 773. This standard must be read broadly to effectuate FOIA's mandate of full agency disclosure. *United States Department of Justice v. Julian,* 486 U.S. 1, 8 (1988). The Government ignores this principle. Instead, it seizes on the single appearance of a single word in this Court's

opinion in *Reporters Committee* and argues that the light cast by the interviewees' names and addresses would not shine "directly" enough on the State Department's performance to give the public an interest in their disclosure. Pet. Br. 23-25.

The information Respondents seek here undeniably would shed light on the State Department's conduct concerning its repatriation policy. Indeed, release of the interviewees' names and addresses would shed light *directly* on that conduct: it would tell the public whom the Department consulted to obtain the facts underlying its evaluation and continuation of its policy of repatriating interdicted Haitians. Thus, even under the Government's test, the public has an interest in such release. But the Government's insistence that the public has an interest only in information shedding light "directly" on agency conduct misses the point.

In asserting that the public's interest in the Haitian interviewees' names and addresses would not tell us anything "directly" about the State Department's activities, the Government ignores the context of the word on which it so heavily relies. In *Reporters Committee,* this Court was asked to accept that the public had an interest in information concerning the unlawful conduct of Charles Medico -- a private person -- as a basis for *inferring* that a Congressman with whom he was allegedly associated also had engaged in criminal activity. The Court acknowledged that determining whether the Congressman had engaged in unlawful conduct met the public-interest test of Exemption 7(C). 489 U.S. at 774. But the Court concluded that the requested information provided no way to answer the question posed: Was *the Congressman* involved in criminal activity? In short, the Court held that the requested information would not shed light

directly, indirectly or otherwise on any *government* conduct. That simply is not the case here.[3]

The Government's argument, in reality, is that the public has an interest only in disclosure of information that sheds light on the *quality* of an agency's performance -- that is, whether the agency functioned well or poorly or made mistakes or not. Thus, the Government argues that recognition of the public's interest in the interviewees' names and addresses would require the Court to guess whether the interviewees would tell Respondents something other than what they told the State Department interviewers. Pet. Br. 26. But FOIA was not enacted only to shed light on the Government's mistakes. It was enacted to "ensure an informed citizenry." *NLRB v. Robbins Tire & Rubber Co.,* 437 U.S. 214, 242 (1978). The "public interest in disclosure is not diminished by the possibility or even the probability that [the State Department] is doing its . . . job right." *Washington Post Co. v. HHS,* 690 F.2d at 264. As this Court stated in *Reporters Committee*, the public has an interest simply in knowing "what [the] government is up to." 489 U.S. at 773.

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[3]The Government also overlooks the pragmatic concern underlying *Reporters Committee* -- the likelihood that when "one private citizen is seeking information about another," he often has no "inten[tion] to discover anything about the conduct of the agency that has possession of the requested records" but rather intends only to shed light on *private* conduct. 489 U.S. at 773. Thus, *Reporters Committee* focused on the distinction between information with a potential to shed light on *official* conduct and that with the potential to shed light only on *private* conduct. It did not focus, as the Government suggests, on the difference between information which, *in and of itself,* sheds light on official conduct and that which provides *a means* to shed such light. In *Reporters Committee,* the latter distinction was irrelevant, because the requested information provided no means to shed light on *the Congressman's* behavior. *Id.* at 774.

By definition, FOIA's concern with open Government embraces preventing the existence of secret agency law as well as preventing the secret application of that law. The disclosure of the identities of persons deported by the Government would fall squarely within that purpose and within the definition of the public interest formulated in *Reporters Committee*. In short, the public has an interest simply in *knowing* on whom the Government acts and on whom it relies in formulating, evaluating and implementing its policies. That interest exists regardless of the wisdom or legality of such action or reliance, and it would be furthered by disclosure of the information here.[4]

Even if the Exemption 6 analysis required a showing that the requested information would shed light on the wisdom or legality of agency conduct, that test is met here. As the court of appeals observed, release of the names and addresses would enable Respondents to "locate the Haitian returnees and inquire about how they were treated after they were returned to Haiti." Pet. App. 9a. From such inquiries, Respondents would be able to determine whether the interview summaries on which the Department based its decisions concerning repatriation accurately reflect the experiences of the returnees.[5] That determination would enable Respondents to form their own conclusions whether the returnees' experiences in fact support the Government's continued policy of repatriating interdicted Haitians. Thus, disclosure very definitely would shed light on the quality of the Department's performance.

IV. The Government's Insistence On Directness Only Confuses The Exemption 6 Balancing Process.

At base, the "directness" with which disclosed information would shed light on agency conduct is irrelevant to the public-interest side of the Exemption 6 balance. The public's interest in requested information depends on *whether* its disclosure would shed light on agency conduct, *Reporters Committee*, 489 U.S. at 773, not on *how* -- directly or indirectly -- it would do so.

If anything, "directness" affects the weight of the individual's interest in maintaining the privacy of requested information. In this case, for example, Respondents candidly admit that, in order to learn every-

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[4]The Government is simply wrong when it argues that applying the Eleventh Circuit's reasoning to the facts of the *Rose* case "would have required the Air Force to disclose the identifying information" contained in the Academy's disciplinary case summaries. Pet. Br. 21-22. Recognizing the public's interest in disclosure is only one part of the Exemption 6 balancing process. That interest must then be weighed and balanced against the individual's privacy interests to determine whether disclosure would be "clearly unwarranted." Thus, recognizing the public interest in the disciplined cadets' identities would not have required disclosure. It merely would have necessitated the very balancing of interests in which the Court engaged with respect to other aspects of the summaries.

The Government's argument concerning application of the Eleventh Circuit's analysis to the facts of *Reporters Committee* is similarly flawed. In that case, the journalists failed to litigate the most relevant public interest -- shedding light on the FBI's conduct regarding the maintenance of rap sheets. This unlitigated interest would have had to be balanced against Medico's privacy interest, which this Court held to be at its "apex." *Reporters Committee*, 489 U.S. at 780. Thus, affirmance of the Eleventh Circuit's public-interest analysis would not throw open agency files. Rather, it would merely require the balancing of interests mandated by Congress.

[5]The Government mistakenly cites *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980), for the proposition that FOIA recognizes no public interest in nongovernmental information. *See* Pet. Br. at 24. That case held only that FOIA confers no cause of action for "an agency's failure to sue a third party to obtain" documents wrongfully removed from governmental custody. 445 U.S. at 151.

thing they can about the State Department's performance, they need to contact the interviewees. Although some courts have considered contact with subjects of requested information relevant to the Exemption 6 balancing process, those courts traditionally have evaluated such contact as a factor affecting the weight of the individual's privacy interest. *See, e.g., Ditlow,* 517 F.2d at 170 & n.15. Thus, the Government errs when it insists that Respondents' need to contact the interviewees affects the public-interest side of the Exemption 6 balance.

The Government's error is readily apparent in the absurd results application of its analysis would produce. For example, the Government's analysis would recognize the public's interest in release of information that "directly" sheds light on the performance of purely ministerial functions but not in information that "indirectly" sheds light on the implementation of crucial governmental policies of widespread public concern. Nothing in this Court's precedents or in the lower-court decisions on which the Government relies justifies such a result.[6]

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[6]The Government relies heavily on *Hopkins v. HUD,* 929 F.2d 81 (2d Cir. 1991), to support its argument concerning directness. Pet. Br. 22-23. The Second Circuit's opinion in that case does state that "disclosure of information affecting privacy interests is permissible only if the information reveals something *directly* about the character of a government agency or official." 929 F.2d at 88. But the holding of *Hopkins* is that for purposes of Exemption 6 "there is little or no public interest in disclosure of the identifying information contained in the certified payroll records" submitted to HUD. *Id.* at 89. That holding is entirely consistent with the public-interest analysis articulated herein.

Unlike the State Department in this case, HUD did not "act on" the construction workers in *Hopkins*. It did not hire them; it did not pay them; it did not contact them. Moreover, it did not formulate, evaluate, or implement any policy based on anything the workers said or did. Thus, identification of the workers would not tell the public *anything* -- whether directly or indirectly -- about the *Government*.

CONCLUSION

The public has a strong interest in knowing the names and addresses of the Haitian returnees interviewed by the State Department, because their disclosure would shed light on the Department's performance of its duty to monitor Haiti's treatment of returnees and on the Government's decision to continue its policy of repatriating Haitians interdicted en route to the United States. In contrast, the Government has failed to demonstrate the existence of a strong privacy interest on the part of the interviewees. Thus, in this case, the public interest in disclosure outweighs the limited privacy interest implicated by revealing the identities of the returnees who spoke with the State Department about their experiences, and the Government has failed to establish that any invasion of privacy resulting from disclosure would be "clearly unwarranted." Accordingly, the judgment of the court of appeals should be affirmed.

June 14, 1991

Respectfully submitted,

JOHN A. POWELL
LUCAS GUTTENTAG
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
132 West 43rd Street
New York, NY 10036
(212) 944-9800

DEBRA A. VALENTINE*
JOHN A. ROGOVIN
STEPHANIE J. PARR
O'MELVENY & MYERS
555 13th Street, N.W.
Washington, DC 20004
(202) 383-5348

JANLORI GOLDMAN
GARY M. STERN
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
122 Maryland Avenue, N.E.
Washington, DC 20002
(202) 675-2327

MARC ROTENBERG
DAVID L. SOBEL
COMPUTER PROFESSIONALS FOR SOCIAL RESPONSIBILITY
666 Pennsylvania Avenue, S.E.
Washington, DC 20003
(202) 544-9240

* *Counsel of Record*